UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K STREET, N.W., SUITE 400
WASHINGTON, DC 20001-8002

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DATE: AUGUST 16, 1996

CASE NO: 94-INA-479

In the Matter of:

THOMPSON HOME FOR CHILDREN,
Employer,

On Behalf of

GAUDENCIA REYES,
Alien.

Appearance: Roseli G. Rosali, Esq., New York, NY
for the Employer

Before: Huddleston, Vittone and Wood
Administrative Law Judges

PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Gaudencia Reyes ("Alien"), a Philippine national, filed by Employer Thompson Home for Children, West Hills, California ("Employer") pursuant to section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act") and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor in San Francisco denied the application and the Employer requested review pursuant to 20 C.F.R. § 656.26.

Under section 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time

of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

In February 1993, as amended, the Employer submitted an application for alien labor certification on behalf of the Alien for the position of Resident Care Aide, to be involved in home care for mentally handicapped children at a basic monthly salary of $700.00 (amended in April 1993 to $1,317.00). Job requirements consisted of four years of high school and three months of experience in the job offered or in the related occupation of child care or baby sitting. The job was described in the following manner:

> Provide care and supervision to mentally handicapped children ages 16 and up with mentality of 2 yrs. old; Prepare food & feed them, bathe, play games with them and change their diapers from time to time; Accompany them to the zoo, beaches, and other recreational areas. Perform other related duties.

(AF 33-34, 47).

The state agency transmitted the application in November 1993, noting that there were seven U.S. applicants. (AF 32). In the October 6, 1993 recruitment report transmitted as part of this package, the Employer explained the basis for rejecting each of the applicants. (AF 35-36).

In a Notice of Findings dated December 7, 1993, the CO notified the Employer of its intention to deny the application because the CO concluded that two applicants (Nemi Ludolph and Sonia Knoester) were rejected for reasons that were not lawful, job-related reasons, in violation of 20 C.F.R. §§ 656.24(b)(2)(ii) and 656.21(b)(6). (AF 26-31).

The Employer, through its attorney, submitted its rebuttal on December 20, 1993. (AF 20-25).

In a Final Determination dated January 12, 1994, the CO denied the application. The denial was based upon the rejection of applicant Knoester for other than job-related reasons. (AF 13-19).

The Employer requested review of the denial of certification by counsel's letter of February 3, 1994. (AF 1-12). In a letter dated July 22, 1994, the Employer's counsel referred the Board of Alien Labor Certification Appeals ("Board") to the arguments made in the request for review and stated that no further brief or position paper would be filed.

DISCUSSION

In accordance with 20 C.F.R. § 656.21(b)(6), the CO determined that the Employer failed to adequately document that U.S. applicant Knoester was rejected solely for lawful, job-related reasons. That section provides that if U.S. applicants have applied for the job opening, the employer must document that such applicants were rejected solely for job-related reasons. In the Notice of Findings, the CO also cited section 656.24(b)(2)(ii), which provides that the CO's determination whether to grant labor certification is made on the basis of whether there is a U.S. worker who is able, willing, qualified, and available for the job opportunity.

Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a good faith requirement is implicit. ***H.C. LaMarche Enterprises, Inc.,*** 87-INA-607 (Oct. 27, 1988). Failure to timely contact a qualified U.S. applicant constitutes a failure to recruit in good faith. ***Loma Linda Foods, Inc.,*** 89-INA-289 (Nov. 26, 1991) (***en banc***). ***See also Prospect School,*** 88-INA-184 (Dec. 22, 1988) (***en banc***). Moreover, reasonable and good faith efforts to contact potentially qualified U.S. applicants may require more than a single type of attempted contact. ***Diana Mock,*** 88-INA-255 (Apr. 9, 1990). However, when an applicant fails to respond to an interview letter an employer should not be penalized as such an occurrence is something over which an employer has no control. ***H.C. LaMarche Enterprises, Inc.,*** 87-INA-607 (Oct. 27, 1988). Further, a U.S. worker may be properly rejected if he or she neither attended a scheduled interview nor sought a change in the schedule. ***R. Gary Moser,*** 91-INA-27 (Jan. 19, 1993). The failure by an employer to provide a telephone number on correspondence to an applicant is not, ***per se***, an indication of bad faith. ***Telesca-Heyman, Inc.,*** 91-INA-140 (May 14, 1992).

In the instant case, applicant Knoester was ostensibly qualified and the Employer appropriately sent a letter to the applicant by certified mail asking that she report for an interview. Significantly, the letter was signed by Araceli Thompson, the Employer's Administrator, but it did not appear on letterhead and it did not bear the Employer's name or telephone number, or Ms. Thompson's title. However, the letter did include the street address of Thompson Home for Children, as listed on ETA 750 (the application for alien employment certification). The letter, which was dated on August 17 and mailed on August 23, 1993, directed applicant Knoester to appear for an interview on September 3, 1993 at 4 p.m.; a return receipt indicated that Ms. Knoester received the letter on August 25, 1993, at least a week prior to the scheduled interview. (AF 51, 55 [stamped incorrectly as 57]).

The Employer argues that applicant Knoester was properly rejected for the position based upon her demonstrated lack of interest. According to Ms. Thompson's correspondence of October 6, 1993, Ms. Knoester failed to show up at the scheduled date and time and did not request another interview, and the Employer would not consider her for the job "for obvious lack of interest." The Employer, through counsel, has argued in its rebuttal and before the Board that if Ms. Knoester were unavailable at the appointed date and time she could have sent a letter to that effect, shown up at a different time, sent someone else on her behalf, or obtained the telephone number from directory assistance, by asking for a "Thompson" at the address (which the operator supposedly would have associated with the "Thompson Home for Children.") (AF 1-6, 20-22, 35-36).

In the Final Determination, the CO rejected the Employer's rebuttal:

> The employer's rebuttal attempts to place a burden on the applicant to pursue a potential job offer where the employer has submitted a letter that leaves out the company name and the telephone number. The employer's opinion that the applicant's failure to pursue the position reflects adversely on the attitude or level of interest that the applicant has toward the position is misplaced. In fact it was the employer who had the burden to show that the applicant was recruited in good faith. However, the employer's rebuttal does not indicate that the employer made any attempt to contact the applicant other than send the letter in question, and the employer then expected the applicant to figure out what the company was and how to call back.
>
> The applicant, Sonia Knoester, is qualified as found in the Notice of Findings. The letter that was sent containing neither the company name nor the telephone number was insufficient to show that the employer attempted to recruit the applicant in good faith or that the applicant was lawfully rejected.

(AF 18-19).

The Employer cites ***Hoover Electric Company,*** 88-INA-315 (June 6, 1989) in support of its position. In that case, the CO found that two qualified and available applicants were not recruited in good faith and were unlawfully rejected when they were sent certified letters requesting them to report for interviews, but the letters included no letterhead or telephone number. The Board reversed, finding that the letters were sent sufficiently in advance of the interview (ten days) to permit rescheduling and the applicants' failure to attend the interviews was an indication that they were not qualified, available workers. Although the Board noted that inclusion of a telephone number would have been preferable, it found this omission not to be sufficient to suggest a lack of good faith when the letters stated the full name and address of the employer, the name of a contact person, and a specific date and time for the interview. The Board further noted that if the CO suspected bad faith, he should have contacted the applicants to find out why they failed to appear for the interviews.

Also pertinent to our inquiry is the Board's ***en banc*** decision in ***Budget Iron Work,*** 88-INA-393 (March 21, 1989) (***en banc***), cited in ***Hoover Electric***. There, the CO denied certification based on its finding that the employer did not conduct a good faith effort to recruit and had not demonstrated lawful, job-related reasons for rejecting four specified applicants. The employer had received the resumes of these applicants on March 16, 1987 and on Wednesday, April 1 sent them mailgrams scheduling the interviews for Monday, April 6 at 9:00 a.m.; the mailgrams provided the date, time, address, and contact person but did not include a business name or telephone number. Noting that, even assuming next day delivery of the mailgrams, the applicants had been provided at most two working days to arrange their schedules, the Board concluded that the employer did not provide the applicants with an ample opportunity to respond to its offer of interview. Further, the Board noted that the applicants did not know the name of the prospective employer and could not call to find the name of the employer, directions to the site, or whether any materials were needed to be brought to the interview. Accordingly, the Board found that "the Employer, by its actions had made it sufficiently difficult for the applicants to obtain an interview so as to discourage them from pursuing the job opportunity" and the employer had not shown a good faith effort to recruit U.S. workers or explained the lawful job related reasons for rejecting U.S. workers.

Other cases have found a lack of good faith recruitment efforts when the applicants were not given adequate time to receive the letters and attend the interviews, and where the employer also failed to provide the applicants with adequate information to contact the employer or sufficient information about the job available. ***Hervco Contractors,*** 93-INA-261 (June 3, 1994). ***See also Michael Alex,*** 90-INA-414 (Dec. 9, 1991).

We find that the instant case is governed by ***Hoover Electric.*** Although this case differs from ***Hoover Electric,*** as the Employer in the instant case failed to provide its company name in its letters to the applicants, this does not appear to have been the determinative factor; rather, the panel in ***Hoover Electric*** was persuaded by the fact that the applicants were given sufficient time to reschedule, if they chose to do so. In contrast, the applicants in ***Budget Iron Work*** and ***Hervco*** were provided little if any time to act prior to the scheduled interview. Here, the applicant had sufficient time to write to the Employer to reschedule the interview or request more information concerning the position, but there is no information indicating that she did so. While it would have been preferable for the CO to contact the applicant to find out her version of the events, the undisputed facts are that she received the interview request more than one week prior to the interview and she made no apparent effort to show up for the interview or to contact the Employer by mail or otherwise. Under these circumstances, the Employer had a basis for concluding that the applicant was not interested and there was a valid basis for her rejection.

In view of the above, we disagree with the CO's determination that the Employer's actions do not reflect a good faith effort to recruit. Thus, the CO's denial of labor certification should be **REVERSED**.

ORDER

The Certifying Officer's denial of labor certification is hereby **REVERSED** and the CO is ordered to **GRANT** certification.

For the Panel:

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Pamela L. Wood
Administrative Law Judge

Chief Judge John Vittone, dissenting.

I would affirm the CO's denial of this application due to the Employer's lack of good faith recruitment. Contrary to the majority's finding, I find that the applicant did not have adequate information to respond to the letter setting up the interview and most likely would have been discouraged from appearing at the interview due to the lack of information regarding the Employer and the interviewer. If the Employer had included either the phone number or the name of the employer on the letter, it would have been sufficient. However, by excluding both the name and a phone number, the letter would discourage applicants from appearing for the interview especially in light of the fact that the advertisement did not include the name of the employer. In addition, Ms. Thompson did not include her title in the letter. I can imagine that an applicant who received a letter setting an interview without the name of the business, a phone number to contact or the title of the interviewer would raise suspicion in an applicant's mind about the legitimacy of the employer and/or the interview. None of the cases cited by the majority contained the factual situation presented her, and if you examine the principles established by ***Hoover Electric Company,*** 88-INA-315 (June 6, 1989) (letters included name and address of employer and 10 days notice) and ***Budget Iron Work,*** 88-INA-393 (March 21, 1989) (mailgrams did not include name of employer or telephone number and gave little time to respond), this case would fall closer to ***Budget Iron Work.*** Accordingly, I would find that the letter was evidence of bad faith recruitment and affirm the CO's denial.

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.